United Nations A/59/377

General Assembly

Distr.: General
22 September 2004
English
Original: Spanish

**Fifty-ninth session**
Agenda item 105 (b)
**Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms**

# Report on the human rights of migrants submitted by the Special Rapporteur of the Commission on Human Rights

## Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report on the human rights of migrants submitted by Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights, pursuant to General Assembly resolution 58/190 and Commission resolution 2004/53.

04-52067 (E) 131004 141004

*Summary*

The present report contains an update on the work of the Special Rapporteur on the human rights of migrants since the presentation of her fifth report to the Commission on Human Rights (E/CN.4/2004/76 and Add.1-4).

The report summarizes the activities carried out during the period under review. The Special Rapporteur notes a continuing deterioration in the human rights situation of migrants and in particular of those with irregular administrative status.

The Special Rapporteur describes a series of developments that took place during the period under review and which have been instrumental in promoting the protection of the human rights of migrants. She notes the scant attention paid to the human rights of this vulnerable group in debates on immigration policy and the need to recognize these rights in practice. The Special Rapporteur welcomes the emergence of many consultative processes in the area of migration management. She nevertheless considers it necessary to share with the General Assembly her thoughts on a number of issues of particular concern which, in her view, require urgent attention.

The Special Rapporteur asks Member States to consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the United Nations Convention against Transnational Organized Crime, as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. She believes that regularization procedures for immigrants with irregular administrative status must be carried out with absolute respect for the human rights of those concerned, so that they cannot be blackmailed if regularization is left to their employers. Lastly, she urges the General Assembly to continue its work on the codification of the draft articles on responsibility of States for internationally wrongful acts, submitted by the International Law Commission, and urges the Commission on Human Rights to do likewise with regard to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.

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# I. Introduction

1. The present report is the third to be submitted to the General Assembly by Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights on the human rights of migrants, pursuant to General Assembly resolution 58/190 and Commission resolution 2004/53.

2. This report covers the activities carried out during the period 1 August 2003 to 30 August 2004. It underscores certain issues of concern which, in the Special Rapporteur's view, require urgent attention. Owing to spatial limitations and in order to avoid needless duplication, reference will be made where necessary to previous reports on the issue where the questions raised are dealt with at length. The report also describes significant developments in relation to the protection of the human rights of migrants that have occurred during the period under review.

# II. Mandate

3. The activities of the Special Rapporteur are carried out in accordance with the Commission on Human Rights resolution 1999/44, by which the Commission established the mechanism and defined its functions. At its fifty-eighth session the Commission decided, by its resolution 2002/62, to extend the Special Rapporteur's mandate by a further three years.

4. The international legal framework for the Special Rapporteur's work is set out in her second report to the Commission on Human Rights at its fifty-seventh session (E/CN.4/2001/83 and Add.1). The methods of work adopted by the Special Rapporteur were described in her first report to the General Assembly (A/57/292).

# III. Activities

## A. Summary of activities

5. The report submitted by the Special Rapporteur to the Commission on Human Rights at its sixtieth session (E/CN.4/2004/76 and Add.1-4) contains a summary of the meetings and activities in which the Special Rapporteur participated from July to November 2003. During the period not covered by that report, the Special Rapporteur took part in the following events:

(a) On 10 and 11 November 2003, she spoke at a seminar entitled "Migration management in an international, European and national perspective", organized in Oslo by the Directorate of Immigration;

(b) On 20 and 21 January 2004 she participated in an expert meeting in Geneva, organized by the Global Commission on International Migration;

(c) On 22 and 23 January, she attended a colloquium entitled "Migration and the new international division of labour", organized by the Graduate Institute of Development Studies of the University of Geneva;

(d) From 26 to 30 January, she participated in a regional workshop on human rights and trafficking in persons, organized in Costa Rica by Global Rights: Partners for Justice. The Special Rapporteur provided information on the provisions of the

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;

(e) From 22 to 29 February she paid an official visit to the Islamic Republic of Iran;

(f) On 1 March she participated in a thematic discussion on non-citizens and racial discrimination, organized by the Committee on the Elimination of Racial Discrimination. The purpose of the meeting was to continue with the drafting of the revised general recommendation on non-citizens;

(g) On 2 March, she was invited to participate in the first session of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Special Rapporteur and members of the Committee decided to remain in regular contact, which would enable them to exchange views on particular subjects and to coordinate the work of both mechanisms;

(h) From 5 to 8 April, the Special Rapporteur presented her fifth report to the Commission on Human Rights at its sixtieth session. The report focused on the living, working and employment conditions of migrant domestic workers. There are four addenda to the report, containing details of communications with Governments and reports on the visits to Spain, Morocco and the Islamic Republic of Iran. On 6 April, the Special Rapporteur took part in a panel discussion on the human rights of migrants organized by Migrants Rights International, Migrant Forum in Asia and RESPECT: European Network of Migrant Domestic Workers. On 7 April she organized an information meeting on the content of her annual report for non-governmental organizations (NGOs) attending the sixtieth session of the Commission. On 8 April she took part in a panel discussion entitled "Labour migration and human rights", organized by the Steering Committee of the Global Campaign for the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

(i) From 13 to 15 April she travelled to Barcelona, Spain, at the invitation of Observatori DESC, to make a public presentation of her report on the visit to Spain at the Faculty of Law of Pompeu Fabra University. The Special Rapporteur met authorities of the Catalan Autonomous Community and representatives of civil society;

(j) From 17 to 21 May, she participated in the Ninth Meeting of the Regional Conference on Migration, held in Panama City. The meeting was attended by the Vice Ministers of Belize, Canada, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States of America;

(k) From 9 to 18 June, she paid an official visit to Italy, on which the Special Rapporteur will report to the Commission on Human Rights at its next session;

(l) From 21 to 25 June, she participated in the eleventh annual meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights. The meeting adopted, inter alia, a joint statement on the human rights of migrants (see E/CN.4/2005/5, annex I);

(m) On 20 and 21 July, she participated in a research workshop in Geneva, organized by the United Nations University, as part of a project entitled "Structural approaches to understanding and combating human trafficking";

(n) From 26 to 29 July she attended the Hemispheric Conference on Migration Policy, held in Quito during the First Social Forum of the Americas, which is part of the World Social Forum agenda of regional and thematic social forums;

(o) From 2 to 5 September, she has been invited to participate in the plenary meeting of the Human Movements and Immigration (HMI) World Congress, organized as part of Forum Barcelona 2004. The Special Rapporteur will also organize a dialogue entitled "Good governance and shared responsibility";

(p) On 9 and 10 September she will participate in the Berne Initiative regional consultations for the Americas in Santiago, Chile;

(q) 20-30 September the Special Rapporteur will pay an official visit to Peru.

## B. Observations

### 1. Visits

6. During the period under review, the Special Rapporteur carried out official visits to Spain, Morocco, the Islamic Republic of Iran and Italy. At the sixtieth session of the Commission on Human Rights, she presented reports on her missions to Spain and Morocco, carried out in 2003 (E/CN.4/2004/76/Add.2-3) and a preliminary note on her February 2004 visit to the Islamic Republic of Iran (E/CN.4/2004/76/Add.4). Since then the Special Rapporteur has visited Italy and is planning a visit to Peru in September 2004. She has also expressed a wish to visit Burkina Faso and Côte d'Ivoire in early 2005 and efforts are being made to find dates that will suit all parties.

7. Ever since she began her work, the Special Rapporteur has focused in large part on "fault lines". During the first years of her mandate, for example, she analysed the migratory flows triggered by the economic disparities between the countries to the north of the United States-Mexico border and those to the south;[1] during the period covered by the present report she has concentrated on the European and Mediterranean migratory context. Following her visits during the past year to Spain, Morocco and Italy, the Special Rapporteur hopes to be able to complete her work with a visit to sub-Saharan Africa in early 2005.

8. In addition, the issue of mixed migration and its relationship to refugee outflows prompted the Special Rapporteur in February 2004 to visit the Islamic Republic of Iran, where she concentrated on the so-called voluntary repatriation programmes. The Special Rapporteur submitted a preliminary note on this visit to the Commission on Human Rights at its sixtieth session in advance of the report to be presented at the Commission's next session.

9. The Special Rapporteur has continued to work on the follow-up to the recommendations contained in the reports on her visits. On 7 November 2003 she sent a letter to the Government of Canada concerning implementation of the recommendations contained in her report (E/CN.4/2001/83/Add.1).[2] Similar letters will be sent in the near future to the other States she has visited. The Special

Rapporteur wishes to thank the Mexican National Institute for Migration (INM) for its invitation to take part in a working meeting to be held in January 2005 to review actions taken by INM on the recommendations contained in document E/CN.4/2003/85/Add.2.

## 2. Case studies

10. In all her work, as mandated by the Commission on Human Rights, the Special Rapporteur takes into account a gender perspective when analysing information received and pays special attention to cases of discrimination and violence against women. She also considers it essential to take account of the composition and source of migration flows in order to better protect the human rights of migrants, given the risks and abuses they may face during the migration process.

11. The report presented by the Special Rapporteur to the Commission on Human Rights at its sixtieth session (E/CN.4/2004/76) focused on the living, working and employment conditions of migrant workers employed in domestic service. In the Special Rapporteur's view, the situation of this group illustrates three of the most important challenges of international migration in modern times: first, the extent and feminization of migration. What is new about these movements is no longer their magnitude so much as the increase in the number of countries of origin and the high proportion of women involved, particularly in certain Asian countries; second, the difficulty of obtaining recognition of the human rights of immigrants, particularly those with irregular administrative status; and lastly, the need for rights-based migration management.

12. Using the broad definition of the tasks involved in domestic service developed by the International Labour Organization (ILO),[3] the Special Rapporteur analysed in her report the treatment of female migrant workers employed in this sector in the light of the principal international human rights instruments and the legal framework developed by ILO in this area. The Special Rapporteur observes again in her report that, even when there exists a range of basic human rights norms that are applicable to non-citizens, the reality that immigrant women — particularly those in domestic service — face is a far cry from what is laid down in international law. Women employed in domestic service must accept abusive clauses in their contracts, are lured into debt by recruitment agencies, have their documents withheld and, in many cases, are subjected to ill-treatment and sexual violence by their employers. The Special Rapporteur describes how many women selected by recruitment agencies end up as victims of trafficking and, consequently, of labour exploitation which may involve conditions that are tantamount to servitude or forced labour. In the Special Rapporteur's view, the reason for the abuse and discrimination suffered by these women is their triple status as women, immigrants and, in many cases, as undocumented persons.

13. In her report the Special Rapporteur encourages States which admit such workers under a sponsorship and special visa system to review their legislation and ensure that the workers' status does not depend directly on the employment relationship with a given employer, since such dependent status leaves these women without protection and even leads them to remain silent about abuses for fear of being dismissed and/or repatriated.

### 3. Cases of violations of human rights of migrants

14. During the period under review, the Special Rapporteur continued to receive complaints of alleged violations of the human rights of migrants. Addendum 1 to the report submitted to the Commission (E/CN.4/2004/76/Add.1) includes the texts of complaints sent to governments between January and December 2003, as well as replies received from governments. The communications sent and received since then will be summarized in the report to be submitted by the Special Rapporteur at the next session of the Commission.

15. Pursuant to the working methods adopted, the complaints received were transmitted to the governments concerned, in accordance with the urgent appeals and letters of allegation procedures. The situations in which violations of the human rights of this group are alleged to have occurred during the period under review, giving rise to the intervention of the Special Rapporteur, include cases of: (a) arbitrary detention; (b) harsh detention conditions; (c) torture and abuse during detention, including cases involving unaccompanied minors; (d) denial of the right to consular protection for detained immigrants, even in the case of immigrants sentenced to death; (e) deaths of immigrants in police custody; (f) deaths as a result of the excessive use of force by members of the police and security forces; (g) failure to provide minimum guarantees of a fair trial; (h) refoulement at the border as a result of arbitrary decisions; (j) summary expulsions; (k) massive deportations and violations of the human rights of deported persons; (l) impunity for crimes committed against immigrants; and (m) gender violence.

16. In her communications to governments, the Special Rapporteur has also expressed her concern at a number of situations involving violations of the human rights of migrant workers, including: (a) abusive working conditions imposed by employers, sometimes under conditions similar to slavery or forced labour; (b) withholding of passports; (c) non-payment of wages; (d) restrictions on freedom of movement, verbal and physical abuse and precarious conditions in housing that employers may be required to provide; (e) denial of the right of association and assembly; and (f) abuses by migrant worker recruitment agencies resulting from inadequate regulation of the sector.

17. As she has done in the past, the Special Rapporteur has transmitted to governments her concerns regarding alleged acts of intimidation against members of immigrant associations, labour unions and non-governmental unions specializing in human rights and migration.

18. Through the letters of allegation procedure, the Special Rapporteur has requested certain governments to supply information on the application of current immigration laws and bilateral agreements for hiring migrant workers directly from their country of origin. The purpose of these communications is to verify respect for minimum standards of protection of the human rights of this vulnerable group. The Special Rapporteur also often sends communications requesting information on measures taken by specific States to deal with illicit trafficking of immigrants and trade in human beings, and protect the victims of these types of offences.

19. During the period under review, communications were sent jointly by the Special Rapporteur and by the following special public mechanisms of the Commission on Human Rights: Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the promotion and protection of the

right to freedom of opinion and expression; Special Rapporteur on torture; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on violence against women, its causes and consequences; Working Group on Arbitrary Detention; Special Representative of the Secretary-General on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on the sale of children, child prostitution and child pornography. The Special Rapporteur would like to point out that although the communications sent to the governments concerned refer to individual cases or specific situations of alleged violations of human rights, that does not mean that they are not representative of the situations faced by this group on a daily basis.

20. The Special Rapporteur is now preparing her next report to the Commission on Human Rights. In it she will examine the progress observed in the protection of human rights of migrants since the establishment of the office of Special Rapporteur in 1999 and the challenges posed by the phenomenon.

# IV. Human rights of migrants

## A. Developments during the period 2003-2004

21. The Special Rapporteur would like to draw attention to a number of developments that occurred between 2003 and 2004 which attest to the significant progress that has been made in protecting the human rights of migrants.

22. After the entry into force on 1 July 2003 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and pursuant to article 72 thereof, the members of the body responsible for monitoring the application of the Convention were elected at a meeting of States parties convened by the Secretary-General in December 2003 at United Nations Headquarters. The Special Rapporteur welcomes with satisfaction the establishment of the Committee and is pleased to inform the General Assembly that she met the members of the Committee at its first session, held in Geneva from 1 to 5 March 2004. At that meeting, the members of the Committee and the Special Rapporteur agreed on the importance of strengthening cooperation between the United Nations mechanisms responsible for protecting human rights during the migration process and decided to meet on a regular basis from then on to exchange views on certain matters and coordinate their activities.

23. In the framework of the mechanisms set up under United Nations human rights conventions, the Special Rapporteur wishes also to draw attention to general recommendation XXX, on discrimination against non-citizens, which was adopted by the Committee on the Elimination of Racial Discrimination at its sixty-fifth session in August 2004 to replace general recommendation XI (1993). She shares the view of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. David Weissbrodt, to the effect that "since problems relating to the treatment of non-citizens arise under each of the seven principal human rights treaties, it would be desirable for the treaty bodies jointly to ... establish a consistent, structured approach to the protection of the rights of non-citizens" (E/CN.4/Sub.2/2003/23, para. 33). The adoption of general recommendation XXX will make it possible to move in that direction.

24. The Special Rapporteur welcomes the entry into force, on 29 September 2003, of the United Nations Convention against Transnational Organized Crime. She is also encouraged by the fact that the two protocols supplementing the Convention, i.e., the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, entered into force on 25 December 2003 and 28 January 2004, in that order. Pursuant to article 32 of the Convention, the first session of the Conference of the Parties to the Convention was held in Vienna from 28 June to 9 July 2004.

25. With regard to mechanisms other than conventions, the Special Rapporteur wishes to draw attention to decision 2004/110, adopted by the Commission on Human Rights at its sixtieth session, providing for the appointment, for a period of three years, of a Special Rapporteur whose mandate will focus on the human rights aspects of the victims of trafficking in persons, especially women and children. The Commission requested the Special Rapporteur to submit an annual report, together with recommendations, on measures required to uphold and protect the human rights of the victims.

26. Over the past few months, United Nations agencies and other international organizations have also paid special attention to the phenomenon of migration. The Special Rapporteur welcomes with satisfaction the establishment of the so-called Geneva Migration Group (GMG). Senior officials of the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the International Labour Organization (ILO), the International Organization for Migration (IOM), the United Nations Conference on Trade and Development and the United Nations Office on Drugs and Crime have agreed to establish an informal mechanism for holding regular consultations for the purpose of, inter alia: exchanging information; identifying critical issues, gaps, best practices, etc., along the migration "life cycle"; agreeing on common positions, responses and actions; providing direction and leadership; contributing to major initiatives of GMG members and the international community; promoting interest, dialogue and debate on migration-related issues; and working towards integrating human rights, refugee protection and criminal justice dimensions in the general debate on migration.[4]

27. At its ninety-second session, held in Geneva in June 2004, the International Labour Conference announced the adoption of a plan of action on migration to guarantee that migrant workers will be protected by international labour standards, national legislation and legislation relating to social protection. It is very important that the ILO plan envisage the development of a non-binding multilateral framework to promote rights-based actions relating to migrant workers and initiate a dialogue on the issue of migration within ILO, with the participation of international and multilateral organizations.

28. At the regional level, the Special Rapporteur wishes to draw the attention of the General Assembly to Advisory Opinion OC-18/03, on the juridical situation and rights of undocumented migrants, issued on 17 September 2003 by the Inter-American Court of Human Rights. In May 2002, pursuant to article 64.1 of the American Convention on Human Rights, Mexico requested an advisory opinion from the Court. In its advisory opinion, the Court examined the following specific issues submitted for its consideration: (a) obligation to respect and guarantee the human rights and fundamental nature of the principle of equality and non-

discrimination; (b) application of the principle of equality and non-discrimination to migrants; (c) rights of undocumented migrant workers; and (d) State obligations in the determination of migration policies in the light of the international instruments for the protection of human rights.

## B. Recognition of the human rights of migrants

29. The information received on alleged violations of human rights, as well as the data gathered on official missions conducted during the period under review, have brought to light certain facts and trends that the Special Rapporteur would like to bring to the attention of the General Assembly.

30. The communications from the Special Rapporteur to governments show a steady deterioration of the human rights situation of migrants, particularly in the case of those with irregular administrative status. From the complaints of alleged human rights violations that have been received, it appears that the most frequent abuses against this group are those that occur in the context of discriminatory, xenophobic and racist practices, administrative detention of undocumented immigrants and different forms of exploitation of migrant workers. In her visits, the Special Rapporteur has noticed an increase in the pressures stemming from international migration and an aggravation of certain problems pertaining to the smuggling of migrants.

31. This situation contrasts with the scant attention given to the human rights of this very vulnerable group in debates on immigration policies. In exercising their sovereign right to regulate the entry, stay and movement of migrants and their policy on immigration, asylum and refuge, States should bear in mind the international obligations they have assumed in the area of human rights. In other words, States parties to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child must guarantee to anyone who is in their territory and subject to their jurisdiction the rights recognized in those legal instruments, in keeping with the principle of equality and non-discrimination which is laid down in those treaties and which is, moreover, a general principle of international human rights law. All States parties to the International Covenant on Economic, Social and Cultural Rights should also undertake to guarantee the enjoyment of the rights set forth therein, with no discrimination whatsoever, particularly on the basis of national origin.[5]

32. Despite the fact that these basic rules of human rights are applicable to non-citizens, the actual circumstances of migrants, particularly those with irregular administrative status, do not match the ideas reflected in the aforementioned instruments. The Special Rapporteur has expressed on numerous occasions her profound concern at the denial of human rights to this group. It is of little use for a State to say that it agrees with the text of the human rights conventions when its legislation on aliens allows for discrimination in the application of those rights. This same concern is expressed in the preamble to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[6] which states that "the rights of migrant workers and members of their families have

not been sufficiently recognized everywhere and therefore require appropriate international protection."

33. It is essential to ensure the proper application and interpretation of these provisions aimed at guaranteeing that the rights and fundamental freedoms of migrants are respected in practice. Hence the importance of the progressive interpretation by the human rights treaty bodies of the rules contained in the instruments in question. These interpretations are embodied in a number of general comments and general recommendations, some of which refer explicitly to the obligations of States parties with respect to non-nationals. Nevertheless, for the purposes of this report, the Special Rapporteur will confine herself to mentioning briefly the principles established by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, since it would be impossible to carry out an in-depth analysis in the limited space available.

34. In its general comment No. 15, the Human Rights Committee states that reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant "to all individuals within its territory and subject to its jurisdiction" (para. 1), as provided in article 2, paragraph 1, of the International Covenant on Civil and Political Rights. The Committee's experience in examining periodic reports shows that "in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant" (para. 2).

35. The Committee's general comment No. 18 states that "non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights" (para. 1). The general requirement of non-discrimination with respect to the rights guaranteed in article 2, paragraph 1, of the International Covenant on Civil and Political Rights "must be guaranteed without discrimination between citizens and aliens" (general comment No. 15, para. 2), except in the case of the rights of citizens and of aliens set forth in articles 25 and 13, in that order. The Committee states that "the Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice" (ibid., para. 4). It should be borne in mind that the general guarantee provided in article 2 of the International Covenant on Civil and Political Rights is not the same as the right set forth in article 26 of the Covenant, which, as noted in the Committee's general comment No. 18, "prohibits discrimination in law or in fact in any field regulated and protected by public authorities", since it is concerned with "the obligations imposed on States parties in regard to their legislation and the application thereof". Thus, the scope of article 26 "is not limited to those rights which are provided for in the Covenant" (para. 12).

36. In its recent general recommendation XXX, the Committee on the Elimination of Racial Discrimination clarifies the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens. In this general recommendation, the Committee addresses specific issues such as protection against hate speech and racial violence, access to citizenship, the administration of justice, expulsion and deportation of non-citizens and the enjoyment of economic, social and cultural rights by non-citizens. The Committee recommends the adoption of a number of measures to prohibit and eliminate racial discrimination in all its forms in regard to the

enjoyment of civil, political, economic, social and cultural rights of non-citizens. It stresses measures relating to labour and employment rights of non-citizen workers, as well as guarantees with regard to non-citizens who are detained or imprisoned.

37. The increasingly prevalent and disturbing practice of administrative detention of undocumented immigrants entails the violation of the principle of non-discrimination with regard to migrants with irregular status. Indeed, when these individuals are arrested by police and sent to detention centres without the possibility of appealing to a court to determine whether their detention is lawful, they are being discriminated against in the exercise of their basic right to freedom and legal security. At the same time, they are arbitrarily denied the right to effective recourse against their detention by police. This situation has become widespread as States have adopted and applied special legislation to combat terrorism, given that such legislation restricts or suspends the procedural guarantees that every detainee should enjoy.

38. A State may take action against persons who enter its territory without authorization, but such measures must respect the human rights of the persons detained, regardless of their migration status. Efforts are being made to have international human rights law establish the boundaries outside of which any detention, whether administrative or judicial, would be considered arbitrary. The existence of a rapid and effective appeals procedure entails the assumption of a guarantee in any situation where a detention has not been ordered by a judge, especially in cases of immigration-related detentions. Consequently, a judge should be able to monitor the material lawfulness of administrative detention and to decide whether or not it is in accordance with law, even when the detention occurs in the transit area of an airport. The Special Rapporteur considers that legal assistance must be available in such cases.

39. At the institutional level, the Working Group on Arbitrary Detention is paying special attention to this issue, both in its visits and in individual cases.[8] In her report to the Commission on Human Rights at its fifty-ninth session (E/CN.4/2003/85), the Special Rapporteur included a study on the human rights of migrants deprived of their liberty. In that report, she expressed her concern at the lack of guarantees to protect human rights during administrative detention of migrants with irregular administrative status, especially for purposes of expulsion (ibid., paras. 65-71). During her official missions, the Special Rapporteur has visited detention centres for immigrants with irregular status in order to determine whether adequate mechanisms were in place for submitting complaints and to determine what are the implications of such centres being managed by the private sector.

40. In brief, the importance of the principle of equality and non-discrimination in the formation of international human rights law relating to migration is reflected in the general comments and general recommendations of the bodies established under the aforementioned conventions.

41. At the regional level, the Inter-American Court of Human Rights has expressed similar views on the principle of equality and non-discrimination in its Advisory Opinion OC-18/03. The Court adds that States must respect and ensure the full and free enjoyment of human rights in the light of the general principle of equality and non-discrimination. Hence, if a State fails to comply with this general obligation and applies any discriminatory treatment, its non-compliance entails the international responsibility of the State (paras. 85-96).

42. The Special Rapporteur also endorses the view expressed in chapter VIII of the Advisory Opinion, which deals with the rights of undocumented migrant workers and states that:

> "... the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship" (para. 134).

43. According to the Court, respect for labour rights applies to both the public and the private spheres (paras. 136-140). The State is "responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination" (para. 152); therefore, "employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways" (para. 153).

44. The Special Rapporteur considers that impunity for abuses and violations of the human rights of migrants will only be breached when States are held internationally responsible and those responsible are punished. She therefore urges the General Assembly to continue its work on the codification of the draft articles on responsibility of States for internationally wrongful acts (resolution 56/83 of 12 December 2001) submitted by the International Law Commission, and urges the Commission on Human Rights to do likewise with regard to the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law" (E/CN.4/2000/62, annex).

45. The Special Rapporteur endorses some of the guidelines adopted by the international community in the Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, from 31 August to 8 September 2001 (A/CONF.189/12, chap. I). The Programme of Action requests States "to promote and protect fully and effectively the human rights and fundamental freedoms of all migrants, in conformity with the Universal Declaration of Human Rights and their obligations under international human rights instruments, regardless of the migrants' immigration status" (para. 26) and urges them "to review and revise, where necessary, their immigration laws, policies and practices so that they are free of racial discrimination and compatible with States' obligations under international human rights instruments" (para. 30 (b)).

46. One of the legal consequences of the internationalization of human rights has been that the treatment afforded by a State to persons under its jurisdiction is now governed by international law, which also recognizes that people have individual rights. The gap between recognition of the rights of migrants under international human rights law and the reality on the ground is, therefore, one of the greatest challenges posed by international migration.

## C. Towards a rights-based migration management

47. Exploring new forms of migration management is currently a priority on the international political agenda of the many intergovernmental consultative processes established to that end. The Special Rapporteur therefore considers that it would be a good idea to share with the General Assembly a number of thoughts on the matter.

48. The objective of these forums, which are generally informal in nature, is to adopt legally non-binding political frameworks that facilitate effective cooperation among States in the management of migratory flows. Consultative processes have given a multilateral perspective to migration management, which until recently has been dominated by bilateral agreements; they encompass almost all the regions of the world, with the exception of central and eastern Africa, the Middle East and the Caribbean. The most important of these forums include: Migration Dialogue for Southern Africa and Migration Dialogue for Western Africa; Regional Conference on Migration, also known as the Puebla Process, and South American Conference on Migration (Lima Declaration Process); Budapest Group and Conference of the Commonwealth of Independent States (CIS); Conference on Western Mediterranean Cooperation (Five plus five); Manila Process, Intergovernmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants, Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Conference); Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America, and Australia.[9]

49. In addition, as the European Union completes its process of harmonizing immigration and asylum policies under the close watch of non-governmental organizations, two highly significant projects will publish their final reports in the coming months: the Berne Initiative and the Global Commission on International Migration. The former, which is backed by the Swiss Government and for which IOM serves as secretariat, seeks to be a forum for intergovernmental cooperation on migration management at the global level. On 2 and 3 July 2003, the Berne Initiative consultations were held in the Swiss capital; these consultations were the first step towards drawing up a framework of governing principles to facilitate cooperation among States with a view to managing international migration. This framework — known as the International Agenda for Migration Management — is being drawn up through a series of regional consultations during 2004 and will, in principle, be adopted at the end of the year during the Second International Symposium on Migration (Berne II). The Agenda will include a set of common principles on migration identified by States and other stakeholders, as well as a compilation of effective migration management practices.[10] Unlike the Berne Initiative, which is a State-owned process, the Global Commission on International Migration is an independent body, and its co-Chairs and commissioners carry out their duties with complete independence. The overall aim of the Commission, which was officially launched on 9 December 2003, is to provide the framework for the formulation of a coherent, comprehensive and global response to international migration. One of the key areas of its mandate, which was developed by a Core Group of States, is to analyse gaps in current migration policies. By mid-2005, the Global Commission will present, for the attention of the United Nations Secretary-General and other stakeholders, a series of recommendations aimed at strengthening international governance of migration at the national, regional and global levels.[11]

50. The Special Rapporteur considers that there are three key factors in managing migratory flows from a human rights perspective: first, an overall, long-term view of the phenomenon that takes account of its causes and effects; second, a dialogue process that establishes an appropriate framework for adopting migration policies that place individuals and their rights at the centre of legislation; and third, migration management based on the shared responsibility of States, i.e., intergovernmental cooperation and collaboration in which States meet their obligations towards migrants properly and in which the role of States varies depending on whether they are a source, transit or destination country.

51. The complex phenomenon of international migration responds to a simple principle: migratory flows are generated as a consequence of socio-economic inequalities and disparities in well-being and human rights. This has been highlighted by, inter alia, the Programme of Action of the International Conference on Population and Development held in Cairo in 1994[12] and, more recently, the World Commission on the Social Dimension of Globalization.[13] The Special Rapporteur considers that the causes of migration and the factors that encourage it, such as "migration fantasies", warrant particular attention. In addition, when addressing migration issues, it is important to remember that some factors inherent in the globalization process (e.g., the global communications revolution, the evolution of information technology and transport, and the growth of transnational communities) and new characteristics to international migration.

52. The scant importance given to the human rights of migrants in migration policy debates is reflected most clearly in the structure of these policies, which by and large focus on controlling migratory flows and regulating the presence of foreign nationals in the territory of the State, and on relations with sending States, all areas in which the human rights of immigrants are not the primary concern. Advisory Opinion OC-18/03 is also a core document in this area, as, according to the Inter-American Court of Human Rights, [American] States may not subordinate or condition the observance of human rights or the principle of equality before the law and non-discrimination to achieving the goals of its migratory policies, any act or omission to the contrary being inconsistent with the international human rights instruments (paras. 161-172). The Special Rapporteur considers that an analysis of the observations and recommendations of the human rights treaty monitoring bodies, and of the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, could be useful here. It should be pointed out that Part III of the Convention, entitled "Human rights of all migrant workers and members of their families", does not create any new rights for this group, but rather reaffirms the rights enshrined in the Universal Declaration of Human Rights and subsequently developed in the principal human rights treaties adopted by the United Nations, which have indeed been widely ratified. Moreover, the preamble to the Convention explicitly states that this reiteration reflects the belief that the rights of migrant workers and members of their families are not duly recognized everywhere, and that if their rights were more widely recognized, recourse to the employment of migrant workers with irregular administrative status would be discouraged.

53. It is common knowledge that migratory flows generate positive effects when properly managed. International migration is a factor of economic development and social progress; however, the way in which this is formulated publicly is worrying. Politicians and the media often portray immigrants as the solution to a series of issues affecting host societies, such as lack of manpower in some sectors of the

economy or problems stemming from the ageing of the population as a result of low birth rates. In accordance with this approach, migratory flows should therefore be managed on the basis of the number of immigrants "necessary" for the development of the economy of the host country. However, this instrumental view of immigration does not take into account that the reasons for migration are as many and as varied as the migrants themselves, nor does it conceive of the possibility that immigrants may wish to reside permanently in the host country. That may be why it is so difficult right now to imagine a political agenda on immigration that envisages (very necessary) discussions of the challenges posed to democracy by immigration, such as the inadequacy of the current model of citizenship. Moreover, an in-depth study should be carried out into the effects of the message being sent to the population of the host country through this political model of immigration management. The Special Rapporteur wishes to note that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopts a different approach, as it refers to migrant workers throughout as social beings with families and recognizes the important role that they play in the global economy, while emphasizing that they nonetheless belong to a highly vulnerable group.

54. During her visits, the Special Rapporteur has been able to witness the effects of the restrictive nature of some current immigration policies. In general, there are many foreign nationals living in transit and destination countries who, despite not having a residency permit, are nonetheless employed. Such people cannot regularize their status because they work in the shadow economy, but at the same time cannot find legal employment because of their irregular administrative status. The existence of such pockets of exclusion calls into question both the effectiveness and the political legitimacy of such policies. The Special Rapporteur welcomes recent efforts by a number of States to regularize the status of illegal immigrants within their territory who can prove that they are employed. Nonetheless, regularization procedures must be carried out with absolute respect for the human rights of such people so that they cannot be blackmailed if regularization is left to their employers.

55. The concept that immigration is a security issue has continued to gain ground since 11 September 2001 and has taken precedence over all other issues, including human rights. The erosion of rights sometimes caused by anti-terrorist measures affects immigrants in particular. The Special Rapporteur stresses that efforts to combat terrorism and organized crime must be solidly grounded in the rule of law and respect for human rights.

56. Combating the smuggling of migrants and trafficking in persons is on the agenda of all consultative processes on migratory management. The Special Rapporteur considers that such crimes need to be combated simultaneously, having noted that people who employ the services of criminal organizations involved in the illicit trafficking of immigrants run a high risk of being victims of trafficking themselves (see E/CN.4/2004/76). Providing potential emigrants with information on the risks of illegal migration and legal channels of entry into destination countries may help to combat the rise of illicit trafficking of immigrants. The Special Rapporteur calls on Member States to consider ratifying the United Nations Convention against Transnational Organized Crime and its additional protocols on the smuggling of migrants and trafficking in persons, and believes that these instruments can be supplemented by measures to safeguard the rights of the victims.[14]

57. The conditions on departure of migrants, the proper management of secure borders, and the interception, detention, deportation/repatriation and return of undocumented migrants are some of the areas in which cooperation between States is essential. The Special Rapporteur considers that source countries have an obligation to ensure that the rights of their nationals are respected during all stages of the migratory process, from a safe departure to a decent return. States of origin should therefore ensure access to effective consular assistance and protection by granting sufficient human, material and financial resources for that purpose. Consular authorities should have sufficient resources to be able to give particular attention to the protection of unaccompanied minors and to assist in the repatriation of victims of trafficking when they explicitly so request.[15]

58. Lastly, the Special Rapporteur urges States to improve the transparency of their consultative processes on migration management, which should also allow for the active participation of non-governmental organizations specializing in that area and other civil society stakeholders. The Regional Conference on Migration and the CIS Conference both had very positive results in this regard.[16]

# V. Conclusions and recommendations

59. Through a concise description of the activities carried out during the period under review, the Special Rapporteur notes a continuing deterioration in the human rights situation of migrants and in particular those with irregular administrative status. The most frequent abuses against immigrants occur in the context of discriminatory, xenophobic and racist practices, the administrative detention of undocumented immigrants, and various forms of exploitation of migrant workers. During her visits, the Special Rapporteur observed an increase in migration pressures and a worsening of certain problems, such as the smuggling of migrants. The Special Rapporteur notes that this situation contrasts with the scant importance given to the human rights of this vulnerable group in discussions on immigration policies.

60. The Special Rapporteur welcomes those developments that took place during the period under review which in her view are helping to improve the protection of the human rights of migrants.

61. The Special Rapporteur considers that traditional ways of managing migratory flows have become obsolete now that immigration takes place in the context of globalization. Up to now the management of migratory flows has been based on the logic of the nation State; however, the extraordinary compatibility between globalization and international migration has led to the failure of immigration policies based on internal security and specific economic interests. Moreover, the phenomenon of migration highlights the existence of structural problems that cannot be resolved through ad hoc measures, much less unilateral ones. The Special Rapporteur would like to point out that, as long as disparities in development persist, immigration flows to rich countries and more prosperous developing countries will continue.

62. The Special Rapporteur is encouraged by the large number of consultative processes on migration management and recognizes the efforts being made in the context of various intergovernmental initiatives to find new ways of effectively managing the phenomenon and arriving at common positions that allow for

consensus in the matter. However, the Special Rapporteur is aware that these forums are a consequence of the gradual politicization of immigration.

63. The Special Rapporteur proposes a form of migration management that is stronger from a human rights perspective and based on the shared responsibility of States to fulfil their obligations towards migrants. The Special Rapporteur urges States participating in consultative processes to adopt management frameworks which encourage the adoption of comprehensive migration policies and legal instruments on immigration and asylum that place individuals and their rights at the centre of legislation. The management of migratory flows must go beyond simply managing the economic interests of States.

64. For this reason, States must ensure that their migration policies and domestic immigration laws (as well as their application) are in line with the principles laid down in international human rights law and with the human rights commitments they have made at the international level. This will require them to balance the sovereign right of States to define their migration policy with respect for and protection of the human rights and fundamental freedoms of all persons under their jurisdiction, regardless of their legal status. The Special Rapporteur considers that an analysis of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families could be useful here. The consular protection and assistance activities that can be carried out by source countries for the benefit of their nationals are also particularly important in terms of protecting the human rights of this group. A series of reflections and observations concerning consultative processes on migration management are included in the relevant paragraph.

65. The Special Rapporteur calls on Member States to consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the United Nations Convention against Transnational Organized Crime, as well as its additional protocols against the smuggling of migrants and trafficking in persons. She considers that regularization processes for immigrants with irregular administrative status must be carried out with absolute respect for their human rights so that they cannot be blackmailed if regularization is left to their employers. Lastly, she urges the General Assembly to continue its work of codification of the draft articles on responsibility of States for internationally wrongful acts submitted by the International Law Commission, and urges the Commission on Human Rights to do likewise with regard to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.

*Notes*

[1] See documents E/CN.4/2003/85/Add.2-3, E/CN.4/2001/83/Add.1 and E/CN.4/2002/94/Add.1.

[2] E/CN.4/2004/76/Add.1, paras. 15-16.

[3] International Standard Classification of Occupations, Group 9131, ISCO-88, ILO, Geneva.

[4] The terms of reference of the Geneva Migration Group may be found on the web sites of the six organizations.

[5] As of 31 August 2004, the International Covenant on Civil and Political Rights had been ratified by 152 countries; the International Covenant on Economic, Social and Cultural Rights, by 149; the International Convention on the Elimination of All Forms of Racial Discrimination, by 169;

the Convention on the Elimination of All Forms of Discrimination against Women, by 177; and the Convention on the Rights of the Child, by 192.

[6] Adopted by the General Assembly in its resolution 45/158, of 18 December 1990. The Convention entered into force on 1 July 2003; as at 31 August 2004, it had been ratified by 26 countries, namely, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Libyan Arab Jamahiriya, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Uganda and Uruguay.

[7] At its twenty-seventh session, held in 1986, the Human Rights Committee adopted general comment No. 15, on the position of aliens under the Covenant; at its thirty-seventh session (1989), general comment No. 18, on non-discrimination; and at its sixty-seventh session (1999), general comment No. 27, on freedom of movement (article 12). At its sixty-fifth session (2004), the Committee on the Elimination of Racial Discrimination adopted general recommendation XXX, on discrimination against non-citizens, to replace general recommendation XI (1993). Other general comments and general recommendations of interest are the following: general comment No. 14, on the right to the highest attainable standard of health (art. 12), adopted by the Committee on Economic, Social and Cultural Rights; recommendation No. 21, on equality in marriage and family relations, by the Committee on the Elimination of Discrimination against Women; and general comment No. 3, on HIV/AIDS and the rights of the child, adopted by the Committee on the Rights of the Child. All the general comments and general recommendations adopted by the treaty monitoring bodies may be found in document HRI/GEN/1/Rev.7.

[8] The Working Group's mandate was clarified and expanded by the Commission on Human Rights in its resolution 1997/50, whereby it included the question of immigrants and asylum-seekers held in administrative custody. See, for example, documents E/CN.4/2003/8/Add.2 and E/CN.4/2004/3.

[9] See the IOM Round Table on Managing Migration at the Regional Level, Geneva, 27 May 2002, http://www.iom.int/en/PDF_Files/mprp/Roundtable/Roundtable_E.PDF.

[10] See www.iom.int/berneinitiative.

[11] See www.gcim.org.

[12] A/CONF.171/13, chap. X.A., para. 10.1.

[13] In February 2004, the World Commission on the Social Dimension of Globalization, set up by ILO in 2002, published its report *A fair globalization: creating opportunities for all* (www.ilo.org/public/english/wcsdg/docs/report.pdf). The report states that global imbalances are morally unacceptable and politically unsustainable. In view of this situation, the Commission proposes a strategy for change based on a set of recommendations. Based on the conviction that fair rules of trade and capital flows need to be complemented by fair rules for the cross-border movement of people, the Commission states in its report that it is necessary to build a multilateral framework that provides uniform and transparent rules for the cross-border movement of people and balances the interests of both migrants themselves and of countries of origin and destination.

[14] See the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add.1).

[15] On consular assistance before the International Court of Justice, see the Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), LaGrand Case (Germany v. United States of America) and the Case concerning Avena and other Mexican nationals (Mexico v. United States of America). At the regional level, see Advisory Opinion OC-16/99, of the 16th Inter-American Court of Human Rights, of 1 October 1999: *The right to information on consular assistance in the framework of the guarantees of the due process of law.*

[16] M. Grange, "Regional Migration Consultative Processes: Where is Civil Society?" in *Asian Migrant Yearbook 2002-2003*, Asian Migrant Centre Ltd. and Migrant Forum in Asia, pp. 56-58.